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Supreme Court, U.S.
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No. 04-1123

In the
Supreme Court of the United States

LESLIE MORGAN, KENNETH STACKER, AND THEODORE BOLDIN, ON BEHALF OF THEMSELVES AND THE CLASSES THEY REPRESENT,

Petitioners,

v.

UNITED PARCEL SERVICE OF AMERICA, INC., AND UNITED PARCEL SERVICE, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly applied this Court's precedents in holding that nationwide classes could not prevail on their pay discrimination claims because the statistical analyses showed no classwide disparity when all major factors affecting pay were considered, and other undisputed facts argued against an inference of a pattern or practice of classwide discrimination.

2. Whether the Court of Appeals properly applied this Court's precedents in holding that nationwide classes could not prevail on their promotion discrimination claims because the undisputed evidence was that there was no classwide discrimination as to the promotions at issue.

3. Whether the Court of Appeals properly applied this Court's precedents concerning summary judgment in holding that nationwide classes failed to produce sufficient probative evidence upon which a reasonable jury could find classwide discrimination in pay or promotions caused by a classwide policy or practice.

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are named in the caption, except that Plaintiffs' individual claims were resolved at the District Court level and they did not participate in their individual capacities in the Court of Appeals. Additionally, the Equal Employment Opportunity Commission (the "EEOC") intervened and actively participated in the proceedings in the District Court, but was not involved in the proceedings in the Court of Appeals. Plaintiffs in their individual capacities and the EEOC are not parties to the proceedings before this Court. *See* S. Ct. Rule 12.6.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

1. The parent company of defendant United Parcel Service of America, Inc. is United Parcel Service, Inc., a Delaware corporation different from defendant United Parcel Service, Inc.

2. The parent companies of defendant United Parcel Service, Inc. are United Parcel Service Worldwide Forwarding, Inc.; United Parcel Service of America, Inc.; and United Parcel Service, Inc., a Delaware corporation different from defendant United Parcel Service, Inc.

3. No other publicly held company holds 10% or more of the stock of either defendant.

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RESPONDENTS' BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

Plaintiffs, Center Managers at United Parcel Service ("UPS"), filed this Title VII and § 1981 suit in 1994 alleging discrimination in (1) promotion and (2) pay and working conditions. 34a-35a; App. 77-79.[1] Despite the decentralization of UPS's employment decisionmaking among more than 60 autonomous Districts, the District Court for the Eastern District of Missouri certified nationwide classes of Center Managers as to each claim. 68a-69a, 81a-83a.

Following more than six years of discovery, including document and data production going back to 1989, over 100 depositions, and multiple expert reports, the District Court granted UPS summary judgment on all claims. 9a, 55a-56a. The Court of Appeals for the Eighth Circuit affirmed this judgment and denied rehearing *en banc*. 27a, 84a. Both courts held, after extensive reviews of the record, that Plaintiffs failed to present probative evidence of a pattern or practice of classwide discrimination as required by this Court's precedents. 14a-15a, 21a-27a, 42a-49a.

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[1] References to a number followed by "a" are to the Appendix to the Petition; references to "App." and "Supp. App." are to the Appendix and Supplemental Appendix in the Court of Appeals.

In an effort to persuade the Court that this case is worthy of review, Plaintiffs focus on a few pieces of evidence taken out of context which they argue establish their claims – ignoring other undisputed facts which compelled judgment against them. We will attempt not to burden the Court with a detailed recitation of facts, but are compelled by S. Ct. Rule 15.2 to set the record straight on certain critical points.

a. UPS's Decentralized Structure and Employment Decisionmaking

Plaintiffs concede that UPS's operations are decentralized at the District level and that "District Managers are responsible for nearly every aspect of district operations, including . . . employee development, promotion, and compensation." Pet. at 4-5; *see* App. 2000-01, Supp. App. 36-37. Each of UPS's 11 geographic Regions in the United States is presided over by a Region Manager and subdivided into approximately six Districts, each in turn presided over by a District Manager. App. 1990-92, 2001. Districts function autonomously and vary in operational difficulty, size, population, package volume, and labor climate. Supp. App. 25, 40-44.

Districts are divided into operations functions and supporting staff functions such as human resources, each headed by a Division Manager who reports to the District Manager. Supp. App. 36-37. Each aspect of an Operations Division is headed by a Center Manager who reports to the appropriate Division Manager. App. 215, Supp. App. 33-35. The entry level managerial

position at UPS is Supervisor; Supervisors report to local Center Managers. 68a.

Both courts below noted that UPS's decentralized employment decisionmaking made it difficult for Plaintiffs to prove a pattern or practice of nationwide discrimination, especially when the undisputed evidence was that the District Managers who make employment decisions had not discriminated in certain areas. 12a-13a, 26a, 42a.

b. The Interrelation Between Pay and Past Pay Factors, Including Performance

Both sides' experts agreed that there was no discrimination in Center Managers' annual salary increases and no difference in overall pay if explanatory variables for past pay such as past performance were taken into account. App. 579, Supp. App. 288-89, 306-09, 342-43. Plaintiffs contend that they nonetheless should prevail as to pay because District Managers determine Center Managers' starting salaries "subjectively" without sufficient "guidelines" and that performance as a Supervisor "plays no part" in the process. Pet. at 5. However, the undisputed record establishes that District Managers' pay decisions are made in a way that builds in consideration of employees' tenure in certain areas of operations and managerial positions and their past pay and performance in those positions. App. 575.

Each managerial job at UPS is assigned a salary level or grade that includes a range of salaries to reflect

employees' varying experience and performance as well as their geographic assignments. Supp. App. 253-54, 470-71, 521. A manager's pay has two components: the base salary assigned at the time of promotion to a new position and the annual salary increases received while in that position.[2] Supp. App. 287, 475-78.

The base salary that accompanies a managerial promotion reflects a percentage increase over the employee's previous salary that takes into account the District Manager's assessment based on input from lower managers of his or her new job responsibilities and the salaries of others in that job. Supp. App. 198, 201-03, 475-78. Thus, a Center Manager's base salary is related to the employee's pay as a Supervisor, which is related to the base salary that accompanied the promotion to Supervisor and subsequent salary increases in that position.

A managerial employee's annual salary increase is directly tied to the employee's performance ratings as determined by his or her immediate manager. Supp. App. 57. The form used by UPS for most of the class period included an assessment of the employee's

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[2] Plaintiffs complain about the Court of Appeals' use of the term "base pay" and assert that base pay means an employee's annual salary without stock award and bonus. Pet. at 10 n.3. As did UPS in its brief, the court used the term "base pay" to refer to the initial salary assigned upon a promotion before any salary increases for job performance. 21a-22a. The experts' final studies of pay included both base pay and salary increases but not stock awards and bonuses. App. 570, 2027, 2114; Supp. App. 287.

performance of up to five pre-selected job responsibilities and an evaluation of 50 general management skills. Supp. App. 59-61, 69. Center Managers and Division Managers make recommendations to their District Manager concerning salary increases for the Supervisors and Center Managers they supervise, and the District Manager makes the final determinations. 39a; Supp. App. 57.

Plaintiffs assert that experts for both sides concluded that there were statistically significant differences in Center Managers' pay for every year from 1991 through 1994 and also in 1996 and 1997. Pet. at 5. To the contrary, both courts below recognized that the analyses of UPS's expert Dr. Evans demonstrated that any difference in pay disappeared as more performance ratings were included. App. 577-79; 18a, 48a. As the courts further recognized, Plaintiffs' expert Dr. Stapleton admitted that "accounting for the[se] past pay differentials . . . really explains the difference in the [experts'] results." Supp. App. 309; 24a, 48a.

Dr. Stapleton excluded historical pay variables, which he recognized were "essentially proxying for past earnings," because it would be "explaining current pay experience by past pay experience." Supp. App. 300, 319. However, he admitted that there was no evidence of discrimination in past pay or its proxies, including performance ratings. Supp. App. 306-13. Both courts below relied on Plaintiffs' failure to show any discrimination in past pay factors in holding that there was no basis to exclude them from the analyses. 23a-24a, 48a-49a. The Court of Appeals also noted the

lack of any proof of discrimination as to Center Managers' salary increases, promotions, and working conditions, all of which were set by the same District Managers who determined base salaries. 26a-27a.

c. The Lack of Discrimination in the Promotion of Center Managers

Both sides' experts concluded that there was no discrimination in the promotion of Center Managers to Division Manager. App. 591, 2111. Despite this fact, Plaintiffs continue to press their promotion claims based on assertions of a lack of objective standards and procedures, discrimination in the promotion of Supervisors, a racial imbalance in UPS's general workforce, and discrimination in the promotion of Center Managers in certain Districts. Pet. at 6-8. These assertions are either belied by the record or irrelevant in light of the undisputed fact that there was no nationwide discrimination in the only promotions as to which classes were certified.

UPS gives District Managers the authority to promote employees to managerial positions within their Districts at the level of Division Manager and below. 68a; Supp. App. 52-54. In making promotion decisions, each District Manager uses information concerning Supervisors' and Center Managers' performance and readiness for promotion which is presented at "People's Meetings" held twice a year to evaluate managerial employees in the District. *Id.* The District Human Resources Manager may display an

employee's photograph for the benefit of those who do not know him or her by name. Supp. App. 52.

When a promotion opportunity arises, the District Manager consults lists compiled at the People's Meetings of the employees deemed most ready for promotion to that position. App. 216; Supp. App. 52. Although experience gained in both Supervisor and Center Manager positions is considered in evaluating an employee's promotion to Division Manager, the progression is from Supervisor to Center Manager to Division Manager. Supp. App. 430-31. The District Manager may select any qualified Center Manager in the District to fill an opening for Division Manager or determine that there is no suitable candidate in the District. Supp. App. 47-48.

Plaintiffs rely on a cohort analysis by their expert Dr. Weiner which purports to conclude that it takes black Supervisors longer to be promoted to Center Manager and then Division Manager. Pet. at 7; App. 2111-13. Both courts below held this analysis to be irrelevant to the class claims, recognizing that Dr. Weiner admitted "it is inappropriate . . . to examine time to promotion from Center Level Manager to Division Level Manager." App. 2113; 14a, 44a-45a.[3] The District Court specifically excluded Supervisors

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[3] Although Plaintiffs assert that UPS "did not rebut" their cohort analysis (*see* Pet. at 15), UPS demonstrated that it had significant flaws, including its failure to consider performance. Supp. App. 325-26, 357-58, 559-62.

from the classes to avoid conflicts between them and the Center Managers who supervised them. 77a.

Plaintiffs also cite statistics comparing the racial make-up of UPS's Division Managers with all managerial employees and the overall workforce. Pet. at 7; 98a-102a. The courts below held that these comparisons are equally irrelevant because they do not focus on the pool of employees from which Division Managers are chosen. 13a-15a, 44a. UPS employees do not skip over the Supervisor and Center Manager positions, and Supervisors are not eligible for promotion to Division Manager. Supp. App. 430-31.

Finally, Plaintiffs assert that there were no blacks promoted to Division Manager in 45 Districts during the class period, and more than 800 promotions of whites overall. Pet. at 7; App. 2072-75. The courts below noted that these figures do not take into account the fact that UPS generally promotes Center Managers within the District to Division Manager. 12a, 42a-43a. UPS's expert Dr. Evans performed an analysis which determined that more blacks were promoted to Division Manager than would be expected considering the availability of qualified candidates and the number of promotions in each District. App. 591. Overall, more than 90 blacks were promoted. App. 2072-75. The courts also noted that in any event evidence of discrimination in only some Districts would tend to disprove and not establish nationwide discrimination. 12a-13a, 42a.

REASONS FOR DENYING THE WRIT

This case presents a straightforward and correct application of the governing law to undisputed facts. Although Plaintiffs contend that the Court of Appeals "rejected" this Court's precedents concerning proof of pay discrimination, the proper applicant pool to analyze in promotion discrimination cases, and the standards for summary judgment (*see* Pet. at i, 8, 13), in fact the court relied on the very cases Plaintiffs claim as the controlling law. Thus:

- the court relied on *Bazemore v. Friday*, 478 U.S. 385, 400 & n.10 (1986), in holding that Plaintiffs' statistical analyses of pay were not probative of discrimination because they did not account for the major factors that determined pay at UPS (22a-23a);
- the court held that Plaintiffs' evidence on promotion did not focus on the proper pool of employees from which Division Managers are chosen (Center Managers within the District), as required by *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 997 (1988) (13a); and
- the court held that UPS was entitled to summary judgment under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986), because Plaintiffs had not presented evidence on which the jury could reasonably find in their favor (21a, 26a-27a).

Accordingly, the decision below presents no conflict with this Court's precedents and no question worthy of review. *See* S. Ct. Rule 10.

I. The Summary Judgment in Favor of UPS on Pay Was Compelled by This Court's Precedents, Including *Bazemore*, in Light of the Lack of Probative Evidence of a Pattern or Practice of Nationwide Discrimination.

Plaintiffs claim that in denying them (and granting UPS) summary judgment on pay, the Court of Appeals decided an important federal question in a way that conflicts with this Court's decisions in *Bazemore v. Friday*, 478 U.S. 385 (1986), and *National Railroad Passenger Corp. v. Morgan (AMTRAK)*, 536 U.S. 101 (2002). Pet at 8. To the contrary, the Court of Appeals' decision simply applied this Court's well-established precedents to the undisputed facts of this case. There is no conflict and no question worthy of review.

Plaintiffs argue that the experts' analyses showed differentials in Center Managers' pay and established a *prima facie* case of discrimination, and that UPS did not prove the differentials were due to permissible factors. Pet. at 9-12. This argument simply stands the facts of this case and the law on their heads.

Both sides' experts agreed that there was no pay differential when past pay factors were considered, and Plaintiffs had no justification for excluding those factors from the analyses. The undisputed facts demonstrated that present pay depends largely on past positions, pay, and performance; that UPS's employment decisionmaking is decentralized; and that District Managers did not discriminate in setting Center Managers' salary increases, promotions, or working

conditions. These facts not only justified but compelled summary judgment for UPS under this Court's precedents.

To prevail under either a disparate treatment or disparate impact theory of liability, Plaintiffs had to present a *prima facie* case of classwide discrimination caused by a classwide discriminatory policy or practice. A plaintiff in a disparate treatment case must establish that "discrimination was the company's standard operating procedure – the regular rather than the unusual practice." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 (1977). A plaintiff in a disparate impact case likewise must show that a discriminatory practice "has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988); *see Wards Cove Packing Co. v. Atonio*, 490 US. 642, 657 (1989).

As the Court of Appeals recognized, this Court has noted that the "usefulness [of statistics] depends on all of the surrounding facts and circumstances." *Teamsters*, 431 U.S. at 340, quoted at 20a. This Court also has held that even if an expert's statistical study is admissible, summary judgment still may be appropriate if the "evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596

579, 596 (1993).[4] As the Court of Appeals aptly stated, this is just such a case: a "reasonable inference of [pay] discrimination does not arise" because "Plaintiffs' regressions fail to take into account past pay, performance, or both" and "when evaluated in the context of the undisputed facts, . . . fail to create a triable case of pattern-or-practice discrimination." 21a.

Plaintiffs base their pay claims on isolated aspects of the expert report of UPS's expert Dr. Evans, asserting that he showed that UPS paid black Center Managers less than whites. Pet. at 9-10. Both courts below correctly rejected this assertion, noting that Dr. Evans' regression analyses demonstrated that any disparity in pay disappeared when sufficient performance ratings were included. 18a, 48a; Add. 577-79. Plaintiffs are not entitled to rely on a portion of an expert's report taken out of context and ignore his ultimate conclusion. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171-72 (1988).

Plaintiffs argue that this Court's decision in *Bazemore* does not permit consideration of the effect of past performance and other pay factors on current pay. Pet. at 10. To the contrary, as the Court of Appeals explained, the exclusion of past pay from the regressions in *Bazemore* was proper because the lower courts concluded that the defendant had discriminated

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[4] Although the Court of Appeals conducted its own analysis of the record, UPS submits that it could have deferred to the District Court's analysis of the expert evidence. *See General Electric Co. v. Joiner*, 522 U.S. 136, 143 (1997).

in setting past pay. 23a; *see* 478 U.S. at 394. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 207-10 (1974) (holding that current system of paying night staff more perpetuated past discrimination against women, who previously were not permitted to work at night); *AMTRAK*, 536 U.S. at 112 (noting that the question is not "mere continuity" of past discrimination but whether there is a "present violation"). Here, in contrast, the courts below recognized that there was no evidence that past pay or performance evaluations were discriminatory. 23a-24a, 48a-49a.[5]

Indeed, this Court recognized in *Bazemore* that regression analyses which do not "account[] for the major factors" may be "considered unacceptable as evidence of discrimination," and even "so incomplete as to be inadmissible as irrelevant." 478 U.S. at 400 & n.10. The courts below correctly held based on undisputed evidence that Plaintiffs' regressions fall into this category. 21a-24a, 47a-49a.

The record establishes beyond doubt how Center Managers' pay at UPS is determined and the historical factors that affect it, including pay and performance over time in previous positions. Supp. App. 198, 201-03, 475-78. Contrary to Petitioners' assertion, UPS

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[5] Plaintiffs refer to past pay as a "defense" to their showing of unequal pay and contend that they should prevail because UPS failed to prove that the inequality was justified by a factor other than race. Pet. at 10, 11. In fact, it is Plaintiffs who did not make out a *prima facie* case of race discrimination.

never "conceded it does not use past pay in determining current pay" (*see* Pet. at 11)[6] – and the point is belied by the system in place for determining pay. A Center Manager's base salary is set by applying a percentage increase to his or her pay as a Supervisor, which in turn is based on the hourly pay received before becoming a Supervisor and consecutive annual salary increases tied to performance as a Supervisor.

There also is no dispute that any disparity in Center Managers' pay was eliminated with the inclusion of past pay factors. Plaintiffs' expert Dr. Stapleton recognized that UPS's historical variables in UPS's statistical analyses were proxies for past pay and admitted that "accounting for the[se] past pay differentials . . . really explains the difference in the [experts'] results." Supp. App. 300, 309. He further admitted that there was no evidence of discrimination in these variables, including performance ratings, that

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[6] For this "concession," Plaintiffs rely on a statement by Kent C. Nelson (in a deposition years after he retired as UPS's Chief Executive Officer) that he reviewed salaries of blacks and whites based on tenure and job category. Pet. at 11; 111a. This broad overview of compensation is not part of the decentralized process by which local District Managers set Center Managers' pay.

Plaintiffs also rely on UPS deposition testimony that performance evaluations are not used to set a Center Manager's base salary upon promotion to that position. 119a. However, past performance has already been incorporated into the employee's salary as a Supervisor through annual salary increases which were based on performance reviews. Supp. App. 198, 201-03.

could justify their exclusion from his analyses. Supp. App. 306-13.

Relying on these undisputed facts, the Court of Appeals correctly held that statistical analyses which omitted past pay variables were incomplete and insufficient evidence of discrimination. 22a-24a. That holding is in complete accord with *Bazemore*. As the court noted, the lack of probative value of such analyses is underscored by undisputed facts concerning UPS's decentralized decisionmaking, the lack of any direct evidence of discrimination, and the experts' agreement that the same District Managers responsible for setting Center Managers' base salaries did not discriminate with respect to their salary increases or promotions. 26a-27a; *see* pp. 2-3, 6, *supra*. In the words of the court, in light of all these facts "[i]t would be manifestly unreasonable to infer from Plaintiffs' regression analyses that UPS set center managers' base pay lower for blacks as a matter of practice all across the country." 27a.

II. The Summary Judgment in Favor of UPS on Promotion Was Compelled by This Court's Precedents, Including *Watson*, in Light of the Undisputed Evidence That There Was No Nationwide Discrimination as to the Promotions at Issue.

Plaintiffs also ask this Court to review the summary judgment entered in favor of UPS on their promotion claims, contending that both courts below disregarded this Court's decision in *Watson*. Pet. at 13.

Here, too, the courts correctly applied established precedents to the undisputed facts. There is no conflict and no question worthy of review.

Plaintiffs contend that the courts below also disregarded Eighth Circuit precedents, namely, *Emanuel v. Marsh*, 897 F.2d 1435 (8th Cir. 1990), and *Paxton v. Union National Bank*, 688 F.2d 552 (8th Cir. 1982). Neither the panel, which was unanimous as to promotion, nor the Court of Appeals as a whole perceived any conflict with Eighth Circuit authorities that would justify rehearing. In any event, such a conflict is not one of the considerations listed as a basis for review by this Court. *See* S. Ct. Rule 10.

Plaintiffs argue that the courts below distorted their claims and relied on the wrong workpool in analyzing them. Pet. at 13. To the contrary, it is Plaintiffs who have consistently refused to understand the limitations of the classes that were certified as to promotion, or to accept the facts established by the record and their own expert's conclusions. The District Court deliberately defined the classes to include only Center Managers, and the evidence was undisputed that only those employees were eligible for promotion to Division Manager and that District Managers generally made such promotions from within their Districts. Most significantly, every expert who studied promotions concluded that there was no statistical evidence of nationwide discrimination in the promotion of Center Managers to Division Manager.

According to Plaintiffs, their promotion claim is "that blacks who reach the level of Center Manager do not move from *full-time Supervisor* **to** and **beyond** *Division Manager* as fast as whites, and do not move as far as whites." Pet. at 20 (emphases in original). Although Plaintiffs may have sought to bring that claim, the District Court clearly certified classes only as to promotions from Center Manager to Division Manager. 77a-78a. The court noted that broader classes would mean that "class members who are supervisors would be challenging the conduct of center managers" who "would be forced to defend the very conduct they are challenging," and that such issues already had arisen at the certification hearing. 77a. Plaintiffs did not appeal the class definitions, which are in accord with this Court's teachings in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997), concerning class conflicts.

Plaintiffs also did not proffer sufficient evidence of discrimination in the promotion of the classes that were certified to defeat summary judgment. Both courts below relied on the conclusion of Plaintiffs' own expert Dr. Weiner that there was "no statistical difference in the pattern of promotions for Black and White Center Level Managers to their first Division Level Manager job." A. 2111; 12a, 41a. Although Plaintiffs also claimed that no black Center Managers were promoted to Division Manager in 45 Districts (Pet. at 7), UPS's expert Dr. Evans conducted a study which showed that more blacks were promoted from Center Manager to Division Manager than would be expected in light of

availability of qualified candidates and the number of promotions in each District. App. 580, 586, 590-91. In any event, as the courts recognized, proof of discrimination in only some but not all Districts would tend to disprove rather than establish nationwide discrimination. 12a-13a, 42a.

Unable to establish discrimination as to Center Managers' promotions, Plaintiffs rely on a flawed cohort analysis by Dr. Weiner purporting to conclude that it took blacks longer than whites to be promoted from Supervisor to Center Manager and then Division Manager. Pet. at 14. The courts below correctly held that this study was not probative as to the class claims (14a, 45a), especially given Dr. Weiner's admission on this point. App. 2113.[7] The District Court specifically rejected Plaintiffs' argument that their claims were not restricted to the promotions of Center Managers, stating that "[t]he Court . . . has imposed this limitation by virtue of its definitions of the classes certified in this action." 45a.

Plaintiffs also argue that they established a "gross disparity between the percentage of blacks in division level positions and . . . four appropriate UPS internal pools." Pet. at 21. The courts below recognized that these comparisons did not give rise to an inference of discrimination because they did not focus on the pool

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[7] Plaintiffs' claim that UPS "did not rebut" their cohort analysis (Pet. at 15) is incorrect. *See* p. 7 n.3, *supra*.

of employees from which Division Managers are chosen. 13a-15a, 44a. The Court of Appeals specifically cited *Watson*, 487 U.S. at 997, on this point, and both courts noted this Court's admonition in *Wards Cove*, that the "proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified . . . population in the relevant labor market." 490 U.S. at 650, quoting *Hazelwood School District v. United States*, 433 U.S. 299, 308 (1977); *see Mayor v. Educational Equality League*, 415 U.S. 605, 620-21 (1974) (statistics "lack real meaning" when they fail to account for the qualifications for service).

Finally, Plaintiffs contend that UPS promoted more than 800 white Center Managers to Division Manager during the class period even though "there were blacks in sufficient numbers . . . to correct the underrepresentation of blacks at and above Division Manager positions." Pet. at 16. As the courts below noted, Plaintiffs' statistics are not probative because they do not take into account the fact that UPS generally made promotions to Division Manager from Center Managers within their Districts. 12a, 42a. In fact, Dr. Evans' analysis demonstrated just the opposite of Plaintiffs' claim: more blacks were promoted from Center Manager to Division Manager than would be expected considering candidates' availability for

promotions in each District, with more than 90 blacks promoted overall. App. 591, 2072-75.[8]

As the Court of Appeals properly concluded, "Plaintiffs' proof is insufficient under both the disparate-treatment and disparate-impact models" because "their evidence of racial disparities was insufficient, giving rise to no inference of discrimination." 14a, 12a. Plaintiffs also failed to establish a nationwide discriminatory policy or practice, a critical part of their case. *See, e.g., Wards Cove*, 490 U.S. at 657. The use of subjective criteria in local employment decisions cannot alone provide that proof. This Court has recognized the need of employers to consider subjective factors, and instructed that "[i]t is self-evident that many jobs, for example those involving managerial responsibilities, require personal qualities that have never been considered amenable to standardized testing." *Watson*, 487 U.S. at 999. The Court of Appeals acted consistently and not in conflict with this precedent.

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[8] Dr. Evans' study demonstrates that Plaintiffs are incorrect in asserting that UPS admitted there was an underrepresentation of blacks at the Division Manager level. *See* Pet. at 16; App. 705, 1833. The testimony of UPS's former CEO Mr. Nelson confirmed that UPS has "a very fair promotion process" and that qualified blacks are promoted to Division Manager. 115a, 112a-13a, 117a.

III. The Court of Appeals Did Not Weigh Evidence or Otherwise Depart from This Court's Decisions Concerning Summary Judgment in Holding That Plaintiffs Did Not Proffer Probative Evidence of Each Element of Their Claims.

Plaintiffs contend that the Court of Appeals improperly "weighed the evidence, made credibility determinations, drew inferences in UPS's favor, and actually found non-existent facts in both the class pay and promotion cases." Pet. at 22-23. As already demonstrated, the court's decision was based on the application of established law to undisputed facts. It did not contravene any precedents of this Court concerning judicial proceedings on summary judgment.

The Court of Appeals specifically recognized and followed this Court's holding in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), cited at 20a, that "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Plaintiffs are incorrect in stating that the court "acknowledged" that it weighed the evidence. *See* Pet. at 22. Rather, the court's analysis was based on this Court's additional stricture in *Anderson* that "there must be evidence on which the jury could reasonably find for the plaintiff." 477 U.S. at 252, quoted at 10a.

As was explained in *Anderson*, if evidence produced by the nonmoving party "is merely colorable or is not significantly probative, summary judgment may be granted." 477 U.S. at 249-50 (citations omitted).

In granting and affirming summary judgment for UPS, the courts below did not weigh the evidence or intrude into the province of the factfinder. Summary judgment was proper because Plaintiffs did not produce sufficient probative evidence for a reasonable jury to infer that UPS discriminated against Center Managers as a group on either pay or promotion through a nationwide discriminatory policy or practice.

Plaintiffs have had every opportunity to prove their case since filing this action in 1994 but were unable to proffer sufficient evidence to give rise to a reasonable inference of classwide discrimination. Their statistical analyses of pay were flawed due to the failure to take into account major factors that influence Center Managers' pay, which their expert acknowledged eliminated any disparity. Their other expert's analyses demonstrated no difference in promotions from Center Manager to Division Manager. On both pay and promotion, Plaintiffs failed to bring "cold numbers convincingly to life," *Teamsters*, 431 U.S. at 339, quoted at 26a, by producing any anecdotal evidence of intentional discrimination.

Given Plaintiffs' own experts' conclusions that there was no differential in Center Managers' pay when past pay factors are considered and no discrimination in Center Managers' promotions, it would be unreasonable to infer a nationwide pattern or practice of discrimination by UPS. Moreover, Plaintiffs have never alleged a specific nationwide policy or practice that caused such discrimination. Instead, they claim overly subjective decisionmaking by individuals in

more than 60 decentralized and autonomous Districts. As discussed earlier, use of subjective factors is not a discriminatory practice, and decentralization argues against the existence of a nationwide policy.

In short, the Court of Appeals understood the well-established summary judgment standard and properly applied it in affirming judgment in favor of UPS.

CONCLUSION

Because the Court of Appeals correctly applied the law of this Court in holding that Plaintiffs did not establish a *prima facie* case of nationwide discrimination as to Center Managers' pay or promotion, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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